UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, : CR 07-736(S-2)
CR 08-044
:

-against- :
United States Courthouse
Brooklyn, New York

RICARDO FANCHINI, et al., :

July 9, 2008
Defendants. : 12:00 o'clock noon

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TRANSCRIPT OF MOTIONS
BEFORE THE HONORABLE CHARLES P. SIFTON
UNITED STATES SENIOR JUDGE

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Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

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THE CLERK: Criminal cause for motion, the United States versus Fanchini, et al.

MR. SHARGEL: Good afternoon, Your Honor.

THE COURT: Good afternoon.

Why don't you have a seat? We have been making that a practice.

MR. SHARGEL: Sure. I can't break that habit, but I will. I will.

THE COURT: All right. Come on in and have a seat.

All right. United States against Fanchini.

Who is appearing for the government?

MR. TISCIONE: Steven Tiscione, Toni Mele, Licha Nyiendo for the government.

Good morning, Your Honor.

THE COURT: Just for purposes of the record, we've

got two cases, two separate cases on the calendar, 07-736 and, in addition, 08 criminal 44.

Who is here for Mr. Fanchini?

MR. SHARGEL: Gerald Shargel, Henry Mazurek and Evan Lipton.

THE COURT: All right. And for Nikolai Dozortsev?

MR. ZONE: Barry Zone for Nikolai Dozortsev.

Good afternoon, Your Honor.

THE COURT: Good afternoon.

And for Arthur Dozortsev?

MR. SAPONE: Edward Sapone.

Mr. Dozortsev is present in court.

How are you, Your Honor?

THE COURT: Okay. We've got two motions here, or two sets of motions, motions for severance by the defendants in the more -- well, it is 736, right, the second superseding?

MR. TISCIONE: That is correct, Your Honor.

THE COURT: And a motion by the government for consolidation of that case and 08 criminal 44.

Let's start and hear from the defendants. I will give the government an opportunity to respond and then make any arguments that it wishes to make in favor of its motion and get things worked out.

All right. Among the defendants, have you made any arrangements as to who is going to go first?

MR. MAZUREK: Judge, Henry Mazurek on behalf of Mr. Fanchini.

THE COURT: Okay. We've started the practice recently in the courthouse of having everybody speak from their counsel table, since that is a little easier for the marshals to deal with. Have a seat.

Go ahead.

MR. MAZUREK: Yes. Thank you, Judge.

Henry Mazurek on behalf of Mr. Fanchini. I will be arguing the Rule 8(b) severance motion on behalf of Mr. Fanchini on the second superseding indictment in the 07 CR 736 case.

Your Honor, the issue before the Court is actually a fairly simple one, a direct one; that is, that in the second superseding indictment, the government added three counts to the indictment, counts nine through eleven, charging the codefendants Nikolai and Arthur Dozortsev in a health care fraud. Actually, two separate health care frauds; one against each of the codefendants; and then a felon in possession of a firearm charge in Count Eleven against codefendant Nikolai Dozortsev.

The issue before the Court under Rule 8(b) under which Mr. Fanchini moves is whether these additional counts against these defendants are properly joined under the rule which requires that the offenses, or the defendants that are

joined are joined in the same act or transaction, or in the same series of acts or transactions, that constitute an offense or offenses.

In this case, Your Honor, there is no connection on the face of the indictment between these Medicaid frauds in counts nine and ten and the felon in possession of a firearm charge.

What the government appears to argue, and somewhat of a moving target, the government submitted papers last evening in which they changed their argument from their original opposition papers and seemed to be arguing at this time that the health care frauds in counts nine and ten should be joined -- are properly joined in this indictment because the Count Eight in which Mr. Fanchini is charged jointly with the Dozortsev defendants charges that the specified unlawful activity, the health care fraud referenced in counts nine and ten.

I would argue, Your Honor, as argued in the papers, that this is not enough. This is still too tenuous a connection the allow the government to join these defendants on a completely unrelated scheme from the narcotics offenses that are charged as the primary focus of the indictment.

What the government would have you -- would have this Court believe is that simply because they allege it in Count Eight, that that's sufficient with respect to joining

the counts nine and ten.

I refer the Court again to the Biaggi decision in the Second Circuit in which the Second Circuit analyzed a tax versus non-tax offense, arguing or in -- setting forth a principle that if the tax count does not have, or has only a small amount of the unreported income that's charged in the tax count, relating back to the non-tax count proceeds of fraud that was charged in that case, then that still is not enough of a connection to include both of those counts within the same indictment.

That principle that was first put forth in Biaggi was again reinforced in a footnote in the more recent Second Circuit decision in Shellef.

In this case, Your Honor, it is -- there is no similar pattern of the offenses that the Second Circuit has held is a linchpin of determining whether the joinder of defendants is proper as in some of the other Second Circuit cases that we have cited and now the government has cited in the most recent submission.

You have, as best we can tell from the allegations in the indictment, a Medicaid fraud that is not even a conspiracy between the two Dozortsev defendants. They are separately charged in two independent counts, in counts nine and ten, and from the government's papers it is initially -- initially they describe those offenses as the

Dozortsev defendants submitting Medicaid applications -- affidavits with -- showing that they were eligible for the benefits but were not because the government claims that they had -- they had additional assets and income that they were not reporting in these affidavits.

It is hard to see how this is a common plan or scheme with the international narcotics transactions that are charged throughout this indictment.

Also, with respect to the health care counts, there is no identity of participants. It seems, again, from how those counts are charged, that these are independent for personal submissions by the two Dozortsev defendants independently. Again, does not show the kind of connection in the same series of transactions or acts that Rule 8(b) requires.

Those are the arguments with respect to the two health care frauds.

But I would submit, Your Honor, that the government did not respond in their papers last evening to the -- the issue with respect to Count Eleven, which is the felon in possession of a firearm charge against Nikolai Dozortsev. Again, this count is not connected on the face of this indictment in any way with any of the other transactions or acts that are charged in the indictment. There is no allegation that the firearms found during a search of

Mr. Dozortsev's apartment, which appears to have happened at the time that they were executing his arrest, have anything to do or were used in connection with or in furtherance of the narcotics conspiracies charged back in the 19 -- largely in the 1990s in the earlier parts of the indictment.

So with respect to that last count, Your Honor, the government doesn't even attempt, it appears, to show how the felon in possession of a firearm count, added as almost an afterthought, based on evidence found at the time of Mr. Dozortsev's arrest, would be connected in the same series of transactions or acts that are charged in the international narcotics trafficking scheme which makes up the primary part of this indictment.

With that said, Your Honor, again, I think that as a result of the government's failure to show the connections between these latter counts and the Dozortsev defendants with the other counts that are charged against Mr. Fanchini in the indictment, that the Court under Rule 8(b), which is not, I repeat again, is not a determination of whether the defendants are prejudiced under the standard of Rule 14, that the Rule 8(b) standard has not been met to permissibly join these defendants based on the latter three counts that have been added to the indictment.

THE COURT: Okay. Among the Dozortsev defendants, is there anything you want to say or add?

MR. ZONE: I will start with respect to counts nine and eleven to the health care fraud and the felon in possession counts that are clearly improperly joined.

With respect to the felon in possession count, the -- the rifles recovered were hunting rifles and the count is a felon -- the felony that the government relies on is a twenty-year old tax conviction. Clearly, there is no view that these -- that this count belongs in this indictment at all. Any jury listening to a case like this where guns are found in the home of the defendant will just view him as just a pure criminal having guns.

With respect to the health care fraud, it was initially my understanding, and my reading of the count in the indictment, that he had improperly obtained Medicaid benefits, and again, the appearance to any jury listening to the counts in this indictment, the evidence that you would expect relative to these counts, would just say well, you have drugs. You have money laundering. You have guns. You have health care fraud. There just can be no fair view, no fair view by a jury, or no fair trial of this case as to Mr. Dozortsev, Nikolai Dozortsev, should these two counts remain in this indictment.

It is clear, that they should be severed under Rule 8(a). They don't belong here.

Clearly, if there is some crazy argument that there

is some connection between the health care fraud and the guns, then clearly the prejudice is astronomical.

With respect to the -- to their now being joined in this second or third superseding indictment, the original indictment included a year's worth of conduct that included monetary transactions and attempted drug conspiracy and we have received discovery relative to that one year of conduct.

Seventeen years of criminal activity was alleged in the first indictment and now in the superseding indictment apparently there are seventeen years worth of money laundering and drug transactions, and I would say that all of that evidence and all of that discovery information out of Europe has nothing to do with Nikolai Dozortsev and the stretch that the government has made is -- to just throw as much junk into this basket and just see what sticks, I -- it is just disjointed. It doesn't make sense.

Clearly, they don't belong together as codefendants. Specifically, the prejudicial effect on Nikolai Dozortsev of seventeen years of this money laundering and drug evidence that the government supposedly had would just destroy and burn Mr. Dozortsev, Nikolai Dozortsev, who has been charged very specifically with small pieces of the money laundering, drug offenses. Clearly, those counts should be severed and they shouldn't be codefendants.

THE COURT: Okay. On behalf of Arthur Dozortsev?

MR. SAPONE: Yes.

Good afternoon, Your Honor. Edward Sapone for Arthur Dozortsev.

I respectfully join, with the Court's permission, in both Mr. Fanchini's and Nikolai Dozortsev's motions and do not want to repeat much of what has been said, but I would like to add that Arthur Dozortsev certainly is not -- doesn't belong in this most recent indictment ending in 736 under Rule 8(b). The reason plainly for that is that we don't have a common scheme or plan existing between the approximately eight crimes with which Mr. Fanchini is alleged to have committed, ranging from engaging in a continuing criminal enterprise conspiracy to import cocaine, heroin and MDMA, conspiracy to distribute three -- those same three narcotics, to import them, is five kilograms of cocaine that's allegedly imported and the charges go on and on.

Plainly, the government alleges that this enterprise existed from 1990 through October of 2007, when in fact, in the indictment just prior to the 736 indictment, Arthur Dozortsev was only charged with conspiracy to launder money in a seven-month period in 2007, from March to October.

In the most recent 736 indictment, all of a sudden we have Arthur thrust into this tremendous indictment, where crimes allegedly occurred back in 1990 when he was in Arizona and he was only eighteen years of age, when there is no

evidence whatever that he even knew Mr. Fanchini, let alone formed any illegal agreement to commit any crime against the United States.

There is no common scheme or plan or purpose involved in these eight narcotics related offenses and a money laundering -- alleged money laundering conspiracy seventeen years later.

So under 8(b), because there is no common scheme or plan, there are separate conspiracies, quite frankly, meaning the alleged Fanchini activity, the eight alleged crimes I just spoke of, and the one money laundering conspiracy with which Arthur Dozortsev is charged, those conspiracies are separate.

I think the Kotteakos case versus the United States, US Supreme Court 1946, is instructive. In Kotteakos, admittedly there were about 35 defendants in eight separate conspiracies, but the Court explained very clearly that where you have separate conspiracies and the government wants to charge them all into one grand conspiracy but the evidence is different and really bears out separate and distinct conspiracies, then it denies the defendant a fair trial and due process.

Here, the government claims that they have four months of evidence to bring before a jury for Mr. Fanchini and Mr. Dozortsev, and what we have is Mr. Artie Dozortsev charged with merely conspiracy to money -- launder money for a

fifty-seven month period seventeen years later.

What we would have here are two separate conspiracies. We would have conspiracy number one, which is the alleged Fanchini-Nikolai Dozortsev conspiracy that lasted for all those years and included all these alleged drug offenses, and then a separate conspiracy within which Artie is alleged to have laundered money at the tail end of it.

So under a Kotteakos rubric we have separate conspiracies and, therefore, they shouldn't be joined together. Under 8(b) we don't have a common scheme or plan or a link that exists between all these alleged drug offenses and continuing criminal enterprise offenses and the ultimate alleged money laundering.

For those reasons, Artie just doesn't belong in this indictment.

THE COURT: Artie?

MR. SAPONE: Artie Dozortsev. Sorry. Arthur.

THE COURT: Let's --

MR. SAPONE: In any event, Your Honor, I -- if --

THE COURT: Just as a matter of general practice, in my courtroom, as litigants will tell you, we talk about people by their full name or their last name. Don't try for a level of informality in a serious matter of this sort.

All right. Anything further?

MR. SAPONE: Yes, Your Honor.

Even if the Court finds that joinder is proper under 8(b), under Rule 14 there should be a severance of Arthur Dozortsev from the indictment because the substantial spillover prejudice that would result would deny him a fair trial. There would literally be three months and three weeks of testimony not against him but against Mr. Fanchini and Nikolai Dozortsev. No limiting instruction, I most respectfully suggest, could cure that.

Arthur Dozortsev is simply charged with having engaged in an agreement to receive $1 million of money which were the proceeds of unlawful activity. That would be a one-week trial.

The government will argue that they have to prove the specified unlawful activity that Mr. Fanchini and Nikolai Dozortsev engaged in for the seventeen years preceding March to October of 2007 in order to prove that aspect of the Artie -- Arthur Dozortsev money laundering, but it is simply not so. They have to show that Arthur Dozortsev had knowledge that the two wire transfers that he allegedly received on behalf of Mr. Fanchini was the product of some unlawful activity. That doesn't take four months to do. So for three months and three weeks I suggest the -- the evidence would be not against him but against the other two defendants who I named and the spillover of that would be impossible for him to overcome.

Finally, Your Honor, under Rule 8(a), what we have here in the 736 indictment is Arthur Dozortsev is only charged with in Count Eight and Count Ten. Eight is conspiracy to commit money laundering, which I have spoken about, and ten is a health care fraud claim.

Under Rule 8(a), those two charges are not properly joined in one indictment. The health care fraud claim has absolutely nothing to do with the money laundering claim. The government I think has already identified where they believe that million dollars came from that allegedly ended in Arthur Dozortsev's account. It had nothing to do with any health care fraud claim.

To stick a health care fraud accusation in with conspiracy to commit money laundering claim in one indictment is just not proper joinder.

The prejudice then under Rule 14 would also result, if Your Honor were to find joinder to be proper under Rule 8, in that a jury would look at Arthur Dozortsev and figure well, he's accused of health care fraud and conspiracy to commit money laundering and there is prejudice in those two unrelated crimes being joined in the same case.

So, for all those reasons, I respectfully join in my cocounsel's motions and ask Your Honor to sever Arthur Dozortsev from his codefendants under Rule 8(b) and to sever the two distinct and separate counts, both Count Eight and

Count Ten, in the 736 indictment.

Thank you.

MR. TISCIONE: Thank you, Your Honor.

I will respond first to the charges made by all three defendants, that counts nine through eleven of the indictment should be -- of the superseding indictment should be severed. Those are the health care fraud and the firearm charges.

With respect to the health care fraud charges, there is no basis for severance for several reasons.

As the defendants concede in their own papers, Rule 8(b), the law under Rule 8(b) is very clear; that in deciding whether joinder is proper under Rule 8(b), the district court may look only to the allegations in the indictment and not to any factual claims made by the parties about the evidence that will or will not be presented at trial.

As the defendants concede, the superseding indictment here specifically charges health care fraud as a specified unlawful activity underlying the money laundering conspiracy against all three defendants.

Thus, the evidence of substantive health care fraud violations will be admissible against all three defendants regardless of whether there is a joint or separate trial and the allegations on the face of the indictment are sufficient

to permit joinder under Rule 8(b).

The defendants rely on several cases that are completely inapposite. They rely specifically on United States versus Biaggi and United States versus Shellef. Both of those are inapposite for two reasons.

First, they both deal with joinder of tax evasion counts to non-tax offenses, which as the Shellef court noted, is governed by a more strict standard for joinder. As the Second Circuit explained in Shellef, joinder of tax charges with non-tax charges under Rule 8 is permissible only if the tax offenses arose directly from the other offenses charged, such as when the funds derived from the acts underlying the non-tax charges, either are or produce the unreported income that is the basis for the tax charge.

In this case there are no tax charges. What's charged here are substantive health care fraud violations that form the basis for part of the money laundering conspiracy that's charged in Count Eight.

The second reason why both of those cases are inapposite is in Biaggi the Court found the joinder was proper with those counts and in Shellef the Court found that joinder was proper for all counts in which the tax fraud -- the tax evasion was based on proceeds from the unlawful activity.

The one count that the Court in Shellef found was misjoined was because none of the proceeds from the unlawful

activities -- the substantive counts led to that tax evasion count. In fact, the tax evasion count was for a period of time before the alleged conspiracy for the substantive crimes even occurred.

There was absolutely no connection and simply it is not this case. In this case the indictment specifically charges that health care fraud was one of the specified unlawful activities of the money laundering conspiracy which is against all three defendants.

With respect to the firearm charge, the Court -- the government would agree, that it is a closer issue with respect to joinder, and we would agree to sever that count with respect to Mr. Nikolai Dozortsev into a separate trial. We would expect that trial would last a day, two at the most; and the government is ready to proceed on that trial whenever it is convenient for the Court.

With respect to the entire rest of the indictment, I think the best arguments for why all of these defendants need to be joined into one single trial is actually made by the defense counsel in their motion asking the Court permission to conduct joint defense meetings in this case when they are on separate indictments. Clearly, at that time all the defendants contemplated that there was an overlap in commonality between the charges, which is borne out by the fact that the superseding indictment now charges all three

defendants in the same conspiracy charge.

In fact, I can't make the argument for consolidation or joinder better than Mr. Shargel did in his own motion. The charges against all three defendants arise out of the same set of facts and circumstances and the same common scheme or plan. They are all charged in the same money laundering conspiracy.

Moreover, as explained in the government's papers, the evidence overlaps for all of these defendants and will be virtually the same regardless of whether they are tried jointly or in separate trials.

As Mr. Shargel also pointed out in his motion seeking joint defense meetings, there are considerable benefits of judicial resources being conserved here. A joint trial would save the parties and the Court from two virtually identical four-month trials, trials that would involve the same witnesses and the same evidence. And I would point out that many of the witnesses in these trials would have to travel internationally to come here and testify in the US.

Those are exactly the type of institutional interests that the Supreme Court has recognized as creating a presumption of joint rather than separate trials with defendants who are properly joined in a single indictment.

The defendants Nikolai and Arthur Dozortsev also seek severance because of the potential spillover prejudice. Under Second Circuit law, the defendants have an extremely

difficult burden. They must demonstrate that a constitutionally fair trial would be impossible if they are tried jointly.

The defendants have not come close to satisfying this burden. They have not identified even a single piece of evidence that would be inadmissible against them in a separate trial, much less the extraordinary prejudice required under the law.

The very nature of the money laundering charge virtually guarantees that the evidence will be the same against all three defendants. In order to prove that the laundered funds were the proceeds of unlawful activity, the government would present the same evidence of narcotics trafficking, cigarette smuggling and health care fraud. That evidence will be presented against Ricardo Fanchini, Arthur Dozortsev and Nikolai Dozortsev, either in a single trial or in separate trials against each defendant.

It is not the case that the money laundering charges against Arthur Dozortsev and Nikolai Dozortsev encompass only a seven-month period or that they are just two wire transfers. Rather, they encompass a conspiracy lasting more than a decade involving tens of millions of dollars and numerous money laundering transactions.

The $1 million Mr. Sapone was referring to was simply the government's plea offer to his client and it has

nothing to do with the actual evidence that will be presented at trial.

The government has evidence that Nikolai and Arthur Dozortsev were involved in laundering illegal proceeds for the Fanchini organization as far back as 1997, which covers nearly the entire period of criminal conduct charged in the indictment against Fanchini.

Nikolai Dozortsev is also charged in a number of drug transactions, including several violations dating back to 1997 as well.

These are expanded charges. They are charges that are more expansive, greater than the charges that were in the original indictment against both Dozortsevs and because they are now charged in the superseding indictment with these expanded charges, the original charges in that indictment against them are irrelevant.

I don't know if Your Honor would like me to address this now, but the defense counsel for Mr. Fanchini also raised another issue with respect to the potential disqualification of Robert Wolf, who is one of Nikolai Dozortsev's attorneys. I would be happy to address the government's response to that argument now, if Your Honor wishes.

THE COURT: No. You responded in the papers. This is an opportunity to respond to oral argument. I didn't hear any oral argument on that. If you want to rest on the papers,

that's fine.

MR. TISCIONE: Yes, Your Honor. The government would simply rest on its papers then.

THE COURT: Okay. Anything more you all want to say by way of reply?

MR. MAZUREK: Yes, Judge.

Henry Mazurek on behalf of Mr. Fanchini.

I just want to reply to the specific argument that the government has made with respect to why the health care fraud counts against the two Dozortsev defendants should remain in the S-2 indictment.

The government would have this Court limit the holdings in Shellef, or reasoning in Shellef, and in Biaggi to only tax cases. I think that that would be incorrect to do because the wrong goes well beyond just the narrow facts of those two cases. Specifically, here the reasoning is even -- is more relevant because we are talking about money laundering versus substantive offenses, which are very analogous to the kind of reasoning that was done in the Shellef and Biaggi cases relating tax cases to -- tax counts to substantive counts.

The reason for that is that in both the money laundering and tax scenarios, you deal with proceeds that have been received from unlawful activities, that -- and in Shellef and in -- in Biaggi --

THE COURT: Sometimes it's from legal activities too.

MR. MAZUREK: Absolutely, Your Honor. I am just dealing with the allegations at this stage that we have to deal with in terms of the allegations in the indictment.

THE COURT: No. I think the point is, I suppose the thinking is that almost any time you have a criminal activity which produces income you can tack on in almost all cases a tax count since it is unlikely it would have been reported. I hope it is not the situation that every time we have illegal proceeds from a crime that it gets laundered. Anyway, it seems --

MR. MAZUREK: These days it seems like the government is using that tact. Perhaps the recent Supreme Court decision in Santos will preclude them from doing that as often as they have been.

With respect to -- a specific argument the government has made on the Biaggi and Shellef cases, they argue that simply because they allege the health care fraud as a specified unlawful activity in the money laundering conspiracy count, then that's the end of the story with respect to Rule 8 argument.

I would refer the Court again back to the dicta -- to dicta in Biaggi that was reinforced in a footnote in Shellef -- in footnote 13 in Shellef. The issue in Biaggi

was that there was a tax count connected to extortion counts in the indictment. The Second Circuit ruled that the tax count against one of the defendants was properly joined in the indictment because the unlawful -- the unreported proceeds came from the primary extortion that was charged in the indictment.

However, in that case the Second Circuit went on to say that, hold on. There is a limiting principle to that. And that is, if in fact the tax count that was added on had primarily, or in the words of the Shellef case which cited to Biaggi, if it weren't for the fact that the overwhelming majority of the unreported income had not been -- had been part of the tax count, then it is not so clear that those counts were properly joined.

If the overwhelming majority of the proceeds in the tax count had come from an unrelated extortion, the Second Circuit in Biaggi said, those counts may not be properly joined. Of course, they were talking in the hypothetical sense since it was the converse that that -- that were the actual facts in that case.

Again, Shellef reinforced that hypothetical scenario that was presented in -- first in Biaggi and again stated that -- if I can quote from that case? Again noting hypothetically that if the trial had focused on the unrelated extortion joinder of a tax count based largely on the

unreported Wedtech extortion, which was the primary extortion in this case, joinder may be improper.

That is what we have in this case, Your Honor. The government in Count Eight, as prior counsel has -- my cocounsel have indicated, have set forth this overarching conspiracy expanding seventeen years. They add two counts of substantive health care fraud individually against the two Dozortsev defendants spanning a time period of approximately four years. On -- taking the government's argument, that you can't look beyond the allegations of the indictment, which I suggest, while one case may have noted that in dicta, is not the way that other cases have decided these issues, the -- the small amounts of the proceeds from this alleged personal health care fraud against the two Dozortsev defendants pale in comparison to the seventeen years of millions of dollars of alleged money laundering that was conducted through extensive international narcotics trafficking.

To tie these two together based on that -- on that very, very thin reed, I would suggest, is exactly the kind of scenario that was foreseen by both the Biaggi court and reinforced again by the Shellef court.

THE COURT: Okay. Yes, sir? Go ahead.

MR. ZONE: I would just say with respect to proceeds of specified unlawful activity in the health care fraud, my understanding of this count is that they received illegal

benefits, Medicaid benefits. Those are the proceeds.

THE COURT: That's what I understood.

MR. ZONE: That's what I understood.

I don't know how those proceeds now become translated into some money that you should put into a bank account, just from a practical standpoint.

That's all I wanted to add.

MR. SAPONE: If I may take that ball and run with it, Your Honor, on behalf of Arthur Dozortsev.

Shellef is instructive, where it says that two separate acts are only joinable under 8(a) if they are of a similar character, based on the same act or transaction or part of a common scheme or plan.

So with respect to indictment seven -- ending in 736 regarding Arthur Dozortsev, we have in Count Ten a health care fraud accusation, in Count Eight a money -- a conspiracy to commit money laundering.

Well, clearly that's not of a similar character. It is certainly not based on the same act or transaction, and there can't be a common scheme or plan.

I respectfully suggest, unless, as Mr. Zone points out, unless what Arthur Dozortsev did with respect to Count Ten was receive some sort of money from an insurance company, some Medicaid money, which he then tried to launder or engage in an agreement or conspiracy to launder, which simply is not

the government's proof.

The government will attempt to prove as to Count Ten that all Arthur Dozortsev did was obtain services. He was able to go to a doctor or a hospital. It was paid for by Medicaid. So certainly then the third prong, common scheme or plan is -- falls short too with respect to the government's ability to prove that because unless there is money to be -- an agreement to launder money that came from health care fraud, then there can't be a common scheme or plan linking one's receipt of benefits, i.e., going to a hospital or a doctor, and laundering money. So under 8(a), they should not be joined, counts eight and ten as they relate to Arthur Dozortsev.

THE COURT: How do you launder Medicaid benefits?

MR. TISCIONE: Your Honor, as --

THE COURT: According to your learning from the investigation in this case?

MR. TISCIONE: As the government attempted to explain in its most recent submission, Your Honor, the health care fraud charged in the indictment encompasses more than simply the receipt of personal Medicaid benefits on behalf of the Dozortsevs and their family members.

The health care fraud charges also include a scheme in which Nikolai and Arthur Dozortsev along with several unindicted coconspirators defrauded Medicaid by submitting

false and/or inflated claims for benefits through medical companies they were associated with. Wiretap interceptions and surveillance established --

THE COURT: What you are talking about is not the benefits. You are talking about the profits made by these companies?

MR. TISCIONE: It is both, Your Honor. I would --

THE COURT: How are --

MR. TISCIONE: I would agree that's --

THE COURT: Benefits would --

MR. TISCIONE: For the benefits, I would agree, that the benefits would not be part of laundering. However, the health care fraud charges also encompass the cash payments that Nikolai and Arthur Dozortsev -- that were their share of the profits from this health care fraud that were then laundered.

THE COURT: All right. You say that was laundered?

MR. TISCIONE: That was laundered through the same --

THE COURT: Is there anything else you want to say by way of response or not?

MR. TISCIONE: No, Your Honor.

THE COURT: All right.

MR. TISCIONE: Actually, I do want to respond to one thing raised by Mr. Mazurek.

He continues to rely on the Shellef case. I would simply point out the difference here is that, unlike in Shellef, the indictment in this case specifically charges that all three defendants laundered the proceeds of the substantive health care fraud.

In Shellef, the Court was dealing with a situation where the tax fraud happened before the substantive allegations were even alleged to have occurred. So there is clearly no connection there between the tax evasion which occurred before the substantive crimes were committed.

In this case, we have substantive crimes that were committed during the same period as the money laundering conspiracy and they are specifically alleged in the indictment, that the money laundering conspiracy involved laundering proceeds of those specified health care fraud violations.

THE COURT: Okay. I must say, I don't find the resolution of the motions as difficult as perhaps is going through all your papers.

I am going to deny both motions; that is, I am going to deny the motions for severance and deny the motion for consolidation as moot.

On the severance motions, it appears to me that there is a basis for concluding that the charges are properly joined because of this alleged overarching common scheme or

continuing criminal enterprise, which had as part of its essence money laundering, in which on the basis of the allegations everybody joined.

I don't see a basis for Mr. Fanchini's application for severance because of the possibility that at some point he will wish to call Mr. Wolf. First of all, because I have no idea as to what sort of evidence it is intended to be presented through Mr. Wolf, and, secondly, because it seems to me that there are a substantial number of hurdles before we get around to disqualifying him.

With respect to the Dozortsevs' motions, it is obviously a different set of allegations made in the more recent charges than were made originally, but the basis for the expansion not only in time but in charges appears on the face of it to be the joint activity, the conspiracy, the continuing enterprise, of money laundering of a variety of different criminal activities, including if the government position is well taken, laundering of proceeds that were the product of Medicaid fraud.

I am glad to hear that the government is itself consenting to severance of the gun charge. I will deal with that charge when, as and if the parties wish to take it to trial.

That brings me to the next matter, which is the issue of preparing for trial on the new indictment. I intend

to issue an amended pretrial order, which at this point will delay the trial of the Dozortsevs' case, or the charges against the Dozortsevs, to put it on schedule with the trial of the charges against Mr. Fanchini, with a trial at least at this point in mid-January and motions addressed to these new charges returnable September 15th, I think it is. January 12th for the trial and September 15th for the pretrial motions.

I am going to enter an excludable order of delay because the Dozortsevs are now joined with a defendant as to whom the Speedy Trial Act period has not expired, a finding that the interests of trial preparation for the complex trial outweighs the interest of the defendants or the public in a more speedy disposition of the matter.

On discovery, as I noted the last time Mr. Fanchini's case was before me, the government is engaging in and is committed to continue a rolling discovery, which means that they will make discovery, Rule 16 discovery as it comes in to the government's possession; and I note that they have already done that with respect to discovery previously furnished to Mr. Fanchini.

The defendants are -- the Dozortsev defendants are not aware of it -- have been told and assume that there may be a delay in the production of discovery coming from other countries that is not yet in the possession or under the

control of the government. I have been assured that that process of getting that out of the hands of the foreign governments will be completed by October 1st?

MR. TISCIONE: That's our hope, Your Honor. That's what we are working towards.

THE COURT: As a result of that, any additional pretrial motions that are necessitated by the delay in discovery until October will form a basis for a new date for additional motions, if needed.

On the assumption, taking the same timeframe that we have been talking about earlier, fix an additional return date for motions of November 17th.

Now, it may be that either the motions or the discovery will not be promptly forthcoming through nobody's fault, that is, that having exercised due diligence in getting the discovery from other countries, it is shown that a brief additional adjournment will put people in a position to be better prepared for trial and, if so, I suppose we'd better start considering an alternative trial date if it has to be delayed. But that is something that, since it involves a number of busy attorneys and a number of moving parts, including the mechanics of dealing with foreign countries, I think we had better start on the process early on of determining when, as the play says, we shall next meet again, if we don't get together here January 12th, which I at this

point fully expect we will be able to do.

Unless there is something further, I've got a sentencing and --

MR. TISCIONE: Actually, Your Honor, Nikolai Dozortsev and Arthur Dozortsev need to be arraigned on the superseding indictment.

THE COURT: Yes. I'm sorry.

If there is no objection to this procedure, since we have been discussing what the new charges are, I will simply enter pleas of not guilty on both of those --

MR. ZONE: On behalf of Nikolai Dozortsev, thank you, Your Honor.

MR. SAPONE: I wish you a good afternoon.

Thank you, Your Honor.

THE COURT: Okay.

MR. SHARGEL: May I? I have one more thing to bring up, if I may.

I want to report to the Court on the conditions at the MDC. I want to first put on the record that finally yesterday Mr. Fanchini was moved to the west building.

THE COURT: Very good.

MR. SHARGEL: And despite the government's suggesting in a letter that they sent to you that counsel should be with Mr. Fanchini as he listens to conversations and reads papers, reads documents, I think we have worked this out

with Mr. Johnson at the MDC who said he would supply the laptop to Mr. Fanchini in the visiting room and counsel need not be present for that. Because it is common, as we have learned from earlier correspondence, it is common for inmates to be working in the visiting room with desktop computers. He is just going to add another computer that will be exclusively for use by Mr. Fanchini.

The one --

THE COURT: This came from the Bureau of Prisons or from --

MR. SHARGEL: That came from Mr. Johnson. Mr. Mazurek spoke to him after we received the letter from the government.

THE COURT: All right. Thank you.

MR. SHARGEL: One more thing. Finally, finally, I promise.

The question of the ten boxes in and the ten boxes out which was discussed yesterday, only this morning a counselor named Mr. Cotton, C O T T O N, as I understand it, told Mr. Fanchini that that was physically impossible. I am putting it on the record but I will attempt to work this out with Mr. Johnson who said it was possible.

THE COURT: Yes. The Bureau of Prisons is not the easiest group to deal with. Come on back if you can't solve it among yourselves.

All right.

MR. TISCIONE: Thank you.

THE COURT: We will take a brief recess and then I will call the next case.

(Matter concludes.)